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No. 865

In the Supreme Court of the United States

OCTOBER TERM, 1968

THE NEW YORK CENTRAL DEVELOPMENT CORPORATION, a Delaware Corporation, and **JONES & LAUGHLIN STEEL CORPORATION,** a Pennsylvania Corporation,
Plaintiffs-Respondents,

vs.

EDWARD J. BYCZYNSKI and **HELENA S. BYCZYNSKI,**
Defendants-Petitioners.

On Petition for Writ of Certiorari
to the Appellate Court of Illinois, Third District.

Petition for Writ of Certiorari

JOHN A. BERRY
422 Streator Nat'l Bank Bldg.
Streator, Illinois 61364

JOHN E. CASSIDY
1125 Jefferson Bldg.
Peoria, Illinois 61602
Attorneys for Petitioners.

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

TABLE OF CONTENTS

	PAGE
Opinion Below	2
Jurisdictional Statement	2
Questions Presented	3
Constitutional Provisions and Statutes Involved	4
Statement of the Case	5
Reasons for Granting the Writ	10
I. The denial of the privileged communications rule between attorney and client violates the due process clause of the Federal Constitution	10
Conclusion	15
Appendix A	App. 1
Appendix B	App. 5
Appendix C	App. 9
Appendix D	App. 10
Appendix E	App. 11

TABLE OF AUTHORITIES

Cases

PAGE

Prudential Insurance Co. of America v. Small Claims Court of the City and County of San Francisco, 76 Cal. App. 2d (adv. 465), 173 P.2d 38, 167 A.L.R. 820 14

Miranda v. Arizona, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602, 10 A.L.R. 3d 974 15

Constitutional Provision

Constitution of the United States Amendment XIV, Sec. 1 14

Miscellaneous

"Wigmore on Evidence" 2nd Edition, Volume 5, Section 2290 11-12

16 Am.Jur. 2d, "Constitutional Law" Sec. 569 14

16 Am.Jur. 2d, "Constitutional Law" Sec. 573 14

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Petition for Writ of Certiorari

Petitioners, Edward J. Byczynski and Helena S. Byczynski, respectfully pray that a Writ of Certiorari issue to review the judgment of the Appellate Court of Illinois for the Third District entered in this cause in The New York Central Development Corporation, a Delaware Corporation, and Jones & Laughlin Steel Corporation, a Pennsylvania Corporation, vs. Edward J. Byczynski and Helena

S. Byczynski, No. 67-95, entered on May 20, 1968, reversing the judgment of the Circuit Court of Putnam County, Illinois. A Petition for Rehearing was timely filed in the Appellate Court of Illinois for the Third District and was denied on July 16, 1968. A Petition to Appeal to the Supreme Court of Illinois as a matter of right was denied on the 23rd day of September, 1968 and the judgment of the Appellate Court of Illinois for the Third District thereby became final on that date.

OPINION BELOW

The Opinion of the Appellate Court of Illinois is appended hereto as Appendix C. It is reported in 238 N.E. 2nd 414 and is not yet reported in Illinois Appellate Court Reports.

JURISDICTIONAL STATEMENT

The Opinion of the Trial Court of Putnam County, Illinois, is appended hereto as Appendix A. The opinion and judgment of the Appellate Court of Illinois for the Third District were filed and entered on May 20, 1968, reversing the judgment of the Circuit Court of Putnam County, Illinois (Appendix C). A Petition for Rehearing was denied by the Appellate Court of Illinois for the Third District on July 16, 1968, Appendix D. Petitioners' application to appeal to the Supreme Court of Illinois as a matter of right on the grounds that a constitutional question arising under the Constitution of the United States is involved for the first time as a result of the action and judgment of the Appellate Court of Illinois was denied on the 23rd day of September, 1968, and the judgment of the Appellate Court of Illinois for the Third District thereby became final on that date.

The jurisdiction of this Court is invoked under Section 1257 (3), Title 28, U.S. Code, providing for review by this Court for Certiorari of decisions of the highest Court of a State wherein a title, right, privilege or immunity is specially claimed under the Constitution or Statutes of the United States.

QUESTIONS PRESENTED

This is a case brought for specific performance of a contract for the sale of real estate. The Trial Court denied specific performance on the ground that the contract was clear and unambiguous. It refused to consider evidence that had been received over objection in the trial of the case without a jury of privileged conversations in a private consultation between petitioners and their attorney.

The contract provided that "the conveyance of above premises is conditioned upon conveyance of suitable exchange property to seller. Seller will sell only if suitable exchange property cannot be acquired by purchaser." The purchaser admittedly made no attempt to locate exchange property and was not in a position to convey exchange property to the sellers at the time it demanded conveyance of the property from the sellers who are the petitioners herein.

The disputed testimony was a conversation between Attorney Walter Durley Boyle and his clients, the petitioners herein, in which he allegedly told them shortly before the contract was executed that it was their obligation to locate the desired exchange property and that the purchaser, respondents herein, would not make any attempt to locate it. This testimony was objected to on the ground that it was a privileged communication. The petitioners also denied that this was said to them in the conversation with the attorney.

The Appellate Court of Illinois for the Third District reversed the judgment of the Trial Court holding that the contract was ambiguous and incomplete. It considered the evidence of the privileged communication between the petitioners and their attorney, affirmed by the attorney and denied by the clients. The consideration of this evidence by the Appellate Court was a material consideration of their reversal of the judgment of the Trial Court.

We contend in this petition that the Appellate Court of Illinois by considering the privileged communication between attorney and client effectively denied petitioners a hearing in which they had the aid of their counsel. The right to a fair hearing includes the right to the aid of counsel at that hearing. The denial of the right to consult with counsel in secret before trial is in effect a denial of the right to the aid of counsel at the trial. It is a denial of due process of law to the petitioners in violation of the Constitution of the United States, Amendment XIV.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States, Amendment XIV, Sec. 1, which provides in part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE.

This case involves the interpretation of an option contract to purchase real estate whereby the defendants, Edward J. Byczynski and Helena S. Byczynski, gave to the plaintiff, New York Central Development Corporation, the option to purchase 370 acres of real estate in Putnam County, Illinois, for $330,000.00. (A. 4, 5) The clause of the contract in dispute in this case is "the conveyance of above premises is conditioned upon conveyance of suitable exchange property to seller. Seller will sell only if suitable exchange property cannot be acquired by purchaser."

Plaintiffs admit they made no effort to locate or acquire any exchange property suitable to the plaintiffs. (A. 9, 10, 11)

The facts leading up to the execution of the option were as follows:

In the latter part of October, 1964, Mr. Frank Tighe, Sam Hellenbrand and Jack Shaffer, representatives of the plaintiffs, came to Hennepin, Illinois, for the purpose of looking over and obtaining options on large tracts of land in the vicinity owned by quite a large number of persons in that area. (A. 33, R. 112) Someone had informed the New York Central representatives that Attorney Walter Boyle represented or would represent most of the landowners in the area. (A. 33, R. 112) Bassi brought these three men to Mr. Boyle's office. (A. 33, R. 112) This was before the Byczynskis had been approached or had come to see Attorney Boyle about this matter. (A. 33, R. 115) They had a general discussion with Attorney Boyle about obtaining options from landowners in the vicinity. Mr. Boyle pointed out that any sale would be for a substantial price and a capital gains tax problem would result. Installment

payments and the question of exchange property was discussed. Mr. Boyle stated that provisions for these problems would have to be in the options. (A. 30, R. 100, 101) The New York Central Development Corporation representatives recognized the fact that the landowners would have a capital gains tax problem and agreed that an exchange property provision could be inserted in the option. (A. 30, R. 101)

Early in November, the New York Central Development Corporation representatives again came to see Mr. Boyle. This, too, was before the time that Mr. Edward Byczynski had seen or employed Attorney Boyle in this matter. (A. 33, R. 115) The New York Central representatives furnished Mr. Boyle with a form of option they desired to use. (A. 34, R. 116) Thereafter, Mr. Boyle drafted an exchange property clause to be inserted in the option form. (A. 34, R. 119) He did this before the Byczynskis came to see him or employed him. (A. 34, R. 120) He did it for other parties, not the Byczynskis. (A. 34, R. 119) Except for the rider, and the typewritten insertion for the exchange property clause, the form used was the same one prepared by the New York Central Development Corporation. (A. 34, R. 119)

These early conversations between the New York Central representatives and Attorney Boyle were out of the presence of the defendants. Evidence of the conversations was objected to on the ground that at that time Attorney Boyle was not an attorney or agent for the defendants, that they were preliminary conversations later merged in the written contract, and they were further inadmissible because they would vary, alter or contradict a written instrument. (A. 29, R. 97, 98) The Court overruled the objection and permitted Attorney Boyle to testify as to the

conversation he had with the New York Central representatives. (A. 29, R. 97, 98)

Over this objection, Attorney Boyle tesitfied that he pointed out that he thought any clients that might come to him concerning the matter would not sell for anything less than a substantial value and there would be a capital gains to be considered. The question of installment payments was brought up and also the question of exchange property to be inserted in the option. Attorney Boyle stated that he insisted so far as he was concerned these would have to be in the option and the railroad, in case of the exchange, was to have no part in it, so that the price would not be raised on exchange property that his clients might be seeking to select. (A. 29, R. 97, 98) The railroad representatives left their form of option with Mr. Boyle and he prepared and inserted in it provisions with reference to an exchange of property. (A. 34, R. 119) Mr. Boyle's own family owned one of the tracts of land that the railroad was interested in purchasing. (A. 33, R. 112)

Thereafter, the railroad representatives went out to see the various landowners including the Byczynskis. (A. 49, R. 282) After discussions with the Byczynskis, they informed the defendants that they would take the papers to Attorney Boyle to prepare the option. In the Summary Judgment proceedings, which is a part of the record, defendants assert, and plaintiffs do not deny, that defendants paid Boyle $50.00 for preparing the option and plaintiffs reimbursed them for this $50.00 (A. 35, R. C128) There is no evidence that plaintiffs ever informed defendants that the New York Central representatives had discussed the matter with Attorney Boyle concerning the option or the form thereof.

Defendants did go to see Attorney Boyle concerning the option. (A. 28, R. 93, 94)

When Attorney Boyle was on the witness stand testifying, he was asked what the conversations were between himself and the Byczynskis concerning the option. (A. 31, R. 102) This was at a time when only Mr. Edward Byczynski and Attorney Boyle were present and Byczynski was consulting him as an attorney with reference to the preparation of the option. (A. 31, 34, R. 103, 126) Objection was made to these questions on the ground that the conversations between Byczynski and Attorney Boyle were privileged communications between attorney and client and the privilege was not waived. (A. 31, R. 102) Further objections were made that all preliminary oral conversations were merged in the written contract and that oral conversations were not admissible to vary, alter or contradict the written contract. (A. 31, R. 102) These objections were overruled at the time of the trial and the evidence received. (A. 31, R. 102, 103)

In response to the question, Boyle answered, "At that time, I told him that under the exchange provision he would be able to locate similar property, real property, and postpone the payment of capital gains taxes on his transaction with the New York Central Development Corporation. I told him that he would be able to locate this property himself without any interference from the Development Corporation, that he would have a reasonable time after the execution or completion of the option to locate the property." (A. 31, R. 104) Boyle was then asked what he said to Mr. Byczynski about his earlier discussion with the New York Central Development representatives about locating property. (A. 31, R. 104) The same objections were made to this question. (A. 32, R. 105) Boyle merely answered, "I told them I had worked

it out with the representative of the railroad that that would be the way it would be handled." Motion to strike the testimony was denied. (A. 32, R. 105)

Byczynski denied when he was on the stand that he was told by Attorney Boyle about the previous conversations with the railroad representatives or that defendants were required to find the exchange property. (A. 50, R. 300) The plaintiffs admit that they have made no attempt to locate exchange property. (A. 9, 10 Answer Par. 8 A. 11, 12, Reply Par. 2) The option that was executed provided that the purchaser may exercise the option on or before March 1, 1965, by giving written notice by United States Mail, addressed to the seller, and that upon payment of $33,000.00 to the seller prior to March 1, 1965, the option may be extended until March 1, 1966. (A. 5) Pursuant to the provisions of the option, the New York Central Development Corporation paid defendants $33,000.00 and extended the option until March 1, 1966. (A. 2, Complaint Par. 2) Thereafter, on September 14, 1965, the New York Central Development Corporation mailed to the defendants a letter purporting to exercise the option. (Plaintiffs Exh. 3, A. 54)

A meeting was held on September 16, 1965, in the law office of John Wosik in Henry, Illinois, at which representatives of both the plaintiffs and the defendants were present. (A. 42, R. 210) Between that time and October 29, 1965, there were several telephone conversations between Gralen, Attorney for plaintiffs, and Wosik, Attorney for the defendants. The conversations at this meeting and the phone conversations were excluded from evidence on the grounds that they were discussions attempting to arrive at a compromise and settlement of an existing dispute. (A. 45, 46, R. 255, 256)

REASONS FOR GRANTING THE WRIT

I.

The denial of the privileged communications rule between attorney and client violates the due process clause of the Federal Constitution.

At the trial of this cause, the attorney was compelled to testify subject to objection, to private consultations and communications between him and his clients, the defendants. However, the Trial Court disregarded this testimony in making its decision. It held that the written contract between the parties was clear, unambiguous and complete and that the case must be decided on the basis of the clear meaning of the written contract. The Appellate Court reversed this decision and held that the contract was ambiguous and incomplete. It considered the private communications between the attorney and client in interpreting the contract and making its decision in this case. We contend that this deprived the defendants of their property without due process of law in violation of the Federal Constitution. It was the decision and judgment of the Appellate Court that violated this constitutional guaranty for the first time. A question under the Constitution of the United States arises for the first time in and as a result of the action of the Appellate Court.

It is a fundamental rule of constitutional law that no man should be punished or deprived of his property without an opportunity for a fair hearing. A person affected by the judgment of a court has the right to be present and be represented by counsel in both civil and criminal proceedings. The right to a hearing includes the right to the aid of counsel in either criminal or civil proceedings. A

denial of the right to consult with counsel in secret before trial is in effect a denial of the right to aid of counsel at the trial. The privilege of a client not to have confidential communications between him and his attorney disclosed in court is one of the most ancient rights known to the law. It goes back to the reign of Queen Elizabeth in England long before the adoption of our Federal and State Constitutions. The law has always recognized that it is necessary to promote and foster freedom of consultation of legal advisers by their clients. If the court can compel disclosure of these confidential consultations then the apprehension on the part of the client of this compelled disclosure would effectively destroy the right to consult with an attorney before trial. While such a right may be more apparent in a criminal case, it is just as important and just as necessary in a civil case.

An attorney can properly represent a client only if he has the full confidence of that client. He will have that confidence only if the rule as to privileged communications is preserved. If a client's right to consult with his attorney is destroyed by abolishing the privileged communications rule, his right to effective representation at the trial, either of a criminal or civil case, is destroyed. He is thus deprived of his liberty or property without due process of law. This is the basis of our petition for writ of certiorari.

The rule that communications between attorney and client are privileged is one of the most ancient and fundamental rights known to our system of jurisprudence. The history and nature of the privilege is set forth by Professor Wigmore in "Wigmore on Evidence" 2nd Edition, Volume 5, Section 2290 as follows:

"The history of this privilege goes back to the reign of Elizabeth, where it already appears as unquestioned. It is therefore the oldest of the privileges for confidential communications. Inasmuch as the testimony of witnesses (in the modern sense) did not come to be a common source of proof in jury trials till the early 1500s (*ante,* par. 1364) and as testimonial compulsion does not appear to have been generally authorized until the early part of Elizabeth's reign (*ante,* par. 2190), it would seem that the privilege could hardly have come much earlier into existence; for there could have been but little material for its application. It thus appears to have commended itself, at the very outset, as a natural exception to the then novel right of testimonial compulsion.

"But the theory of its exclusion, in those days, was very different from that of modern times. It was an objective, not a subjective one,—a consideration for the oath and honor of the attorney, rather than for the apprehensions of his client. How significant the 'point of honor' was, until the end of the 1700s, in almost securing other exemptions from testimonial disclosure, has been already seen (*ante,* par. 2286). Clearly the attorney and the barrister are under a solemn pledge of secrecy, not less binding because it is implied and seldom expressed. 'The first duty of an attorney,' it has been said, 'is to keep the secrets of his clients.' If the 'point of honor' was to be recognized at all as a ground for exemption, then surely the attorney fell within this exemption. And no doubt this was, in the beginning, and so long as any countenance was given to that general doctrine, the theory of the attorney's exemption.

"That doctrine, however, finally lost ground, and by the last quarter of the 1700s, as already noticed (*ante,* par. 2286), was entirely repudiated. The judicial search for truth could not endure to be obstructed by a

voluntary pledge of secrecy; nor was there any moral delinquency or public odium in breaking one's pledge under force of the law. Doubtless the attorney's exemption would have fallen at the same time with the others of like origin, had not a new theory, ample to sustain and even to enlarge it, by that time come to be recognized. That new theory looked to the necessity of providing subjectively for the client's freedom of apprehension in consulting his legal adviser *post,* par. 2291), and proposed to assure this by removing the risk of disclosure by the attorney even at the hands of the law. The new theory begins to appear in the early 1700s, coexists with the older one for half a century, and then, upon the latter's disappearance, begins for the first time to be much dwelt upon and thoroughly developed. One consequence of this tardy origin was that the detailed rules of this privilege (oldest though it really was) were still in the formative stage in the first half of the 1800s. Another and most unfortunate one was that, by reason of the inconsistency of the two theories, in some of their practical applications, the older notion, so far as represented in precedents, struggled along for some time by the side of the newer one, like two powerful streams debouching into the same channel; and until the domination of the newer one was finally established throughout its boundaries, a turbid and confused volume of rulings abounded. Probably in no rule of Evidence having so early an origin were so many points still unsettled until the middle of the 1800s.

* * *

"The policy of the privilege has been plainly grounded, since the latter part of the 1700s, on subjective considerations. In order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed; and hence the law must prohibit such disclosure except on the client's consent. Such is the modern theory."

It has always been recognized that a right to a fair hearing is essential to the judicial process. In 16 *Am. Jur.* 2d, "Constitutional Law" Sec. 569, it is stated:

> "It was a maxim of the common law that 'no man should be punished without an opportunity of being heard.' Hence, no one may be legally divested of his property unless he is allowed a hearing before an impartial tribunal, where he may contest the claim set up against him, and be allowed to meet it on the law and facts and show if he can that it is unfounded. He must be given his 'day in court'."

This guaranty has been included in the Fourteenth Amendment to the United States Constitution.

It has also been recognized that a person does not have an effective hearing unless he has the right to be represented by counsel. The procedure in legal proceedings is such that it requires one skilled in the law to properly present a person's position and contentions to the court. In 16 *Am. Jur.* 2d "Constitutional Law", Section 573, it is stated:

> "One who might be affected thereby has the right to be present at the hearing in person and represented by counsel. The right to a hearing includes the right to aid of counsel, although such aid need not be given at early stages of the proceeding. A state or federal court which arbitrarily (sic) refuses to hear a party by counsel employed by and appearing for him in any case, civil or criminal, denies the party a hearing, and therefore denies him due process of law in the constitutional sense."

In *Prudential Insurance Co. of America* v. *Small Claims Court of the City and County of San Francisco,* 76 Cal. App.2d (adv. 465), 173 P.2d 38, 167 *A.L.R.* 820, it was held

that the right to a hearing includes the right to appear by counsel in both civil and criminal cases. The arbitrary denial of such right constitutes a denial of due process of law.

There has been some conflict of authority in criminal cases as to just when an accused person must be furnished with counsel. This conflict was settled by the United States Supreme Court in *Miranda* v. *Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602, 10 *A.L.R.* 3d 974, holding that an accused must be informed of his right to counsel and supplied with free counsel if necessary as soon as he is threatened with arrest.

This Court has not had occasion to consider whether depriving a client of the secrecy of communications between him and his attorney constitutes a deprival of due process of law. We submit that logically it does. The right to counsel in a civil trial is unquestioned. To deprive a person of this right deprives him of due process of law. If a person is not permitted to confer with his attorney in secret the apprehension of compelled disclosure by his attorney effectively deprives him of his right to representation by counsel at the trial. It deprives him of due process of law in violation of the United States Constitutional guaranty.

CONCLUSION

This case is of importance to citizens throughout the United States. This Court has frequently considered due process of law requirements in criminal proceedings. It has not previously considered the question as to whether the denial of the right of a client to consult in private with his attorney before trial or in the preparation of

documents that eventually lead to a trial in a civil case is a denial of the right to aid of counsel in the trial and a denial of a fair trial thereby depriving him of his property without due process of law.

We respectfully submit that the point here involved deserves the attention of this Court and that the petition for Writ of Certiorari be granted.

Respectfully submitted,

JOHN A. BERRY
JOHN E. CASSIDY
Attorneys for Petitioners